Fw: Rotary Drilling Supply, Inc.

Christopher Muehlberger to: Delia Garcia, Nicole Moran, Deborah Bredehoft

10/29/2012 04:18 PM

Cc: Alyse Stoy

Response from Ameren:

Chris Muehlberger
Assistant Regional Counsel
Environmental Protection Agency, Region 7
New Address:
11201 Renner Boulevard
Lenexa, KS 66219
913.551.7623
913.551.7925 (fax)
muehlberger.christopher@epa.gov

----- Forwarded by Christopher Muehlberger/R7/USEPA/US on 10/29/2012 04:17 PM -----

From: "Brozyna, Barbara" <Barbara.Brozyna@btlaw.com>
To: "'muehlberger.christopher@epa.gov'" <'muehlberger.christopher@epa.gov'>
Cc: "Madonia, Joseph" <Joseph.Madonia@btlaw.com>
Date: 10/29/2012 03:51 PM
Subject: Rotary Drilling Supply, Inc.

On behalf of Joe Madonia, attached is correspondence In Re Rotary Drilling Supply, Inc.

Barb Brozyna
Assistant to H. Roderic Heard
Alison C. Conlon
Joseph F. Madonia
BARNES & THORNBURG LLP
One North Wacker Drive, Suite 4400
Chicago, IL 60606
312-214-5614
312-759-5646 (Fax)
bbrozyna@btlaw.com

RCRA

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BARNES & THORNBURG LLP

Suite 4400
One North Wacker Drive
Chicago, IL 60606-2833 U.S.A.
(312) 357-1313
Fax (312) 759-5646

www.btlaw.com

Joseph F. Madonia
(312) 214-5611
jmadonia@btlaw.com

October 29, 2012

Mr. Chris Muehlberger
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101

Re: Rotary Drilling Supply, Inc., EPA Docket No. RCRA-07-2012-0028

Dear Mr. Muehlberger:

We are writing on behalf of Union Electric Company d/b/a Ameren Missouri ("Ameren") in response to your August 23, 2012 draft Administrative Order on Consent ("AOC") for the Rotary Drilling Supply site ("Site") located in Crystal City, Missouri. EPA alleges in the draft AOC that Ameren is liable under the Resource Conservation and Recovery Act ("RCRA") for the abatement of an imminent and substantial endangerment that allegedly exists at the Site. This letter presents the highlights of Ameren's sufficient cause defense to the proposed RCRA Consent Order, but is not intended to be an exhaustive discussion of all rights and defenses, all of which Ameren expressly reserves, without limitation.

Ameren denies the factual allegations in EPA's proposed order, and denies that it is liable for environmental conditions at the Site. There are several independent reasons why Ameren is not liable:

(i) Fly ash handled lawfully under a General Beneficial Use Exemption ("GBUE") lawfully issued by the State of Missouri and is not a solid waste subject to RCRA regulation;
(ii) Ameren did not "contribute" to any imminent or substantial endangerment at the Site;
(iii) There is no evidence of an imminent or substantial endangerment to human health or the environment at the Site; and
(iv) EPA's proposed remedy incorrectly presumes that fly ash from Ameren was deposited illegally into jurisdictional wetlands that allegedly existed at the Site.

In addition to all of these legal obstacles, EPA's claim is undermined by the fact that the Site had been openly and notoriously receiving materials for structural fill purposes for more than a decade prior approximately 2005, when fly ash first was used at the Site. As early as 1993,

the Site was the final resting place for thousands of sand bags used in the region during the flood, in compliance with a land disturbance permit issued by local regulators. Sources of fill material for the Site apparently included private contractors, the State of Missouri and various municipalities, including Crystal City. Government records confirm that the fill project at the Site was well-known to regulators and was frequently inspected and tolerated for many years prior to the time any fly ash was used. None of those regulators expressed any concerns about wetland issues, but they did notice that household garbage, asbestos-containing materials and PCBs may have been disposed at the Site.

Not surprisingly, aerial photographs confirm that there were no native wetlands left at the site in 2005 when fly ash first started arriving (if any such wetlands existed in the first place). (See Exhibit A for an example.) In light of that history, it simply is not credible for EPA to allege that fly ash (as opposed to all of the other, known and unknown, more likely sources) has caused the environmental conditions reflected in the lab results from EPA's recent tests as a result of direct disposal into wetlands.

For all of these reasons, as more fully explained below, Ameren requests that EPA remove Ameren from its list of potential respondents in connection with the Site.

I. Ameren has no RCRA liability for environmental conditions at the Site.

A. Material handled under a GBUE is not a "solid waste" under RCRA, because it was not "discarded".

To the best of our knowledge, EPA never before has used RCRA as a tool to seek an injunction against a person that has beneficially used fly ash. In fact, none of the cases cited in EPA's June, 2012 proposed CCR Rule involved beneficially reused materials (most were surface impoundments on power plant properties or quarries). The facts of this case certainly do not warrant such a novel extension of RCRA and an unannounced shift in EPA enforcement policies, nor do they warrant EPA's attempt to use RCRA authority to achieve an otherwise unattainable Clean Water Act remedy.

The D.C. Circuit has made it clear that the statutory term "solid waste" must be interpreted in a common sense manner. *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1186, 1190 (D.C. Cir. 1987). It should only apply to "materials that are truly discarded, disposed of, thrown away, or abandoned." *Id.* Materials destined for legitimate beneficial reuse or recycling are "not part of the waste disposal problem" and thus cannot be characterized as solid waste. *Id.* "Solid waste" is predicated on a material being "discarded" and "[s]econdary materials destined for [legitimate] recycling are obviously not of that sort." *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1051 (D.C. Cir. 2000), citing, *AMC*, 824 F.2d 1177.

EPA has recognized that the mere act of transferring a useful material to a third party does not necessarily constitute an act of discarding waste. EPA sometimes uses "legitimacy

criteria" to examine the intent of a person who sends material to a recycler or carries out recycling activities, as explained in the memorandum from Sylvia Lowrance to Hazardous Waste Management Division Directors, April 26, 1989 (Lowrence Memorandum). When fly ash is handled pursuant to a GBUE, though, the intent is demonstrated unequivocally and no further evaluation is needed.

The evidence establishes that Ameren intended for the fly ash to be beneficially used as structural fill. Ameren was not involved in the initial selection of the Rotary Drilling structural fill project and it conducted reasonable efforts with respect to both MRT and Rotary Drilling, it complied with its obligations under the GBUE, and it received reassurances that the structural fill operations at Rotary Drilling were lawful. Indeed, we believe that if this matter proceeded to court, it is certainly possible if not probable that the structural fill project would be viewed as lawful and the proper use of private property by Mr. Coleman. As a result, EPA should recognize that Ameren cannot have liability under RCRA for Rotary Drilling's structural fill project, especially when that project involved so many independent middle-men and so many other sources of fill material that pre-dated the allegations against Ameren.

B. Ameren did not "contribute" to an endangerment simply by providing structural fill material.

As you know, EPA first contacted Ameren about this site last year, alleging that Ameren was liable under the Clean Water Act for environmental conditions at the Site, because Ameren allegedly "deposited" fill material into a "jurisdictional wetland." EPA has apparently abandoned that legal theory and now alleges that Ameren is liable for those same environmental conditions under RCRA, because Ameren allegedly "contributed" to an "imminent and substantial endangerment." Conclusory statements are insufficient and both standards require proof of Ameren's active involvement in site operations. Regardless of whether EPA is trying to establish Ameren's liability based upon allegations that Ameren either "deposited" material into wetlands or "contributed" to an endangerment, the evidence demonstrates that Ameren did neither of those things.

Ameren's primary activity in this matter was to engage a marketer (MRT) to *purchase* the ash and to market it for appropriate applications. MRT then hired an independent trucking company (Kleinschmidt), who transported fly ash from Ameren's Rush Island Energy Center to a structural fill project (Rotary Drilling) pursuant to a General Beneficial Use Exemption. There is no evidence that Ameren *knew* that the fly-ash was used in any way that violated the GBUE, and indeed, no evidence that the fly ash *was* handled improperly. Thus, even if the fly ash *was* a solid waste subject to RCRA regulation, EPA would have the burden of proving that Ameren performed the physical act of disposal, or at a minimum, intended to dispose fly ash illegally. Any such allegations simply would be untrue.

A recent case on the issue of contributor liability under RCRA demonstrates EPA's burden of proof. *Hinds Investments, L.P. v. Angioli*, 2011 U.S. App. LEXIS 15809, (9th Cir.

Aug. 1, 2011). In *Hinds*, the Ninth Circuit held that mere design of equipment that generated waste was not enough to establish liability under RCRA as "contributing to" hazardous waste disposal. Instead, it held "that to state a claim predicated on RCRA liability for 'contributing to' the disposal of hazardous waste, a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process." *Id.* Stated another way, liability under 42 U.S.C. §6972(a)(1)(B) "requires that a defendant be actively involved in or have some degree of control over the waste disposal process." *Id.* Ameren's activity does not meet this test.

Moreover, contributor liability under RCRA and arranger liability under CERCLA are co-extensive. *U.S. v. Aceto Agricultural Chemicals Corp,* 872 F.2d 1373, 1384 (8th Cir. 1989) (Defendants have cited no persuasive reason or authority for distinguishing between the phrase "arranging for" under CERCLA and the phrase "contributing to" under RCRA in the context of this case. Accordingly, for the same reasons we held plaintiffs' allegations were sufficient to state a claim under CERCLA, we now hold plaintiffs have sufficiently alleged defendants "contributed to" the disposal of solid or hazardous wastes under RCRA). The Supreme Court's more recent interpretation of the CERCLA term "arranger" in *Burlington Northern and Santa Fe Railway Co. v. United States,* 556 U.S. 599, 612-13 (2009) is, therefore, relevant. In *BSNF*, Shell sold a new product to a distributor and the only potential basis for arranger liability was that Shell knew there would be some accidental leaks in the transfer of the product. Despite knowledge of these spills, it was not Shell's intent that the material be spilled and took steps to prevent that from happening. Therefore, the Supreme Court held Shell was not an arranger under CERCLA. *Id.* Ameren's activity does not meet this test, either.

Absent evidence that Ameren conducted or intended the disposal of fly ash into jurisdictional wetlands, there is no basis for a RCRA claim against Ameren. Ameren provided its fly ash to a third party with the intent that it be beneficially re-used in compliance with a GBUE. That is not a sufficient basis for liability under RCRA.

II. There is no imminent and substantial endangerment attributable to fly ash.

EPA alleges that there are substantial risks at the Site and to downstream waters. Unfortunately, there is no data from downstream waters and, therefore, no data to support any speculation about potential downstream risks. It would be arbitrary and capricious for EPA to proceed with a RCRA action based upon that incomplete record.

The limited data that does exist demonstrate the substantial speculation inherent in EPA's "finding" that Ameren has contributed to an imminent and substantial endangerment. For example, EPA focused its analysis primarily on fly ash fill as a potential source of metals in the sediments and surface water, even though EPA's sample locations are more closely associated with the railroad than the fill area. In fact, while EPA's own ecological assessment admits that the railroad ballast is a likely source of *some* of those metals, it does not explain why that ballast is not the source of *all* metals of concern to EPA.

EPA concluded that because cadmium, lead, manganese, and zinc concentrations in sediment exceeded background concentrations, and exceeded typical fly ash concentrations, an additional (non-fly ash) source for these metals is likely. The potential source identified by EPA is the railroad ballast. EPA notes that the railroad ballast is made of chat (mine tailings), which is a source of high levels of lead. The highest concentrations of lead were detected in sediment collected at sampling locations next to the railroad tracks (RSD-1, RSD-2, and RSD-3), further supporting the influence of the railroad ballast as a potential source. However, without reference, EPA dismisses the chat ballast as a source of other metals. There is no basis for EPA to dismiss the railroad as a potential source of constituents in all of the samples (with the exception of RDS-6, which is upgradient of the railroad), or to conclude that some of the constituents in the samples are from the railroad, but that the rest are from fly ash. These conclusions are not founded in good science, they are arbitrary and capricious, and cannot support the proposed RCRA order.

Regardless of EPA's "source" identification problems, there is no evidence of environmental effects in Plattin Creek or Willer's Lake. For example, the EPA ecological assessment conclusions suggested evidence of "gradual and ongoing contamination of the drainage to Plattin Creek and Willer's Lake," but no surface water or sediment samples were collected in the lake or in the creek. In addition, a gradient of sediment concentrations in the drainage pathway is not evident for most analytes, and the location of the maximum concentrations varies widely per analyte. In fact, concentrations detected in the samples closest to Willer's Lake (location RDS-1) are below the PECs and acute NAWQCs (with the exception of lead in sediment). This indicates that concentrations are not currently at a level where effects in the lake would be expected. Similarly, EPA indicates that high pH *may* limit revegetation, but pH data were not collected.

Another fundamental flaw in EPA's endangerment assessment is that the quantitative evaluation considered only chronic screening levels. In fact, EPA concluded that an "imminent" and substantial endangerment exists simply because some constituent concentrations are above the chronic screening levels. EPA's own guidance on Eco-SSLs (USEPA, 2005) states that the values EPA relied upon are to be used to screen data to identify contaminants of *potential* concern that *may* be considered for additional evaluation in a baseline ecological risk assessment (BERA). The BERA is what would identify any imminent and substantial endangerment, but EPA did not do one. Even though EPA's own guidance indicates that screening values do not represent cleanup levels, EPA has relied upon them for the purpose of ordering Ameren to perform a Clean Water Act remedy, pursuant to RCRA.

EPA did not do this analysis, but a more relevant (but still far from conclusive) comparison of EPA's data to acute screening levels indicates that there are only few exceedances, and those most likely should be ascribed to the railroad bed. These results do not indicate the existence of any imminent and substantial endangerment, though, so there is no basis for a RCRA claim. See Exhibit B for a summary of the acute screening level comparisons that EPA

should have used. This analysis confirms that fly ash is not a cause of any imminent and substantial endangerment at the Site.

Ameren also has conducted an additional evaluation of EPA's data, using a conservative screening level food web model. That evaluation suggested a possibility of some low level risk posed to small birds or mammals, assuming that such receptors are only exposed to impacted media using very conservative (overestimated) exposure parameters. This evaluation represents the first step in an ecological risk assessment, though, and further investigation would be conducted using site-specific testing or collection of biota as evaluation methods, if warranted. However, these results do not indicate an "imminent or substantial endangerment". In fact, in most cases, such results would not even warrant any further ecological evaluation, let alone a conclusion that there is an imminent and substantial endangerment at the site.

III. EPA's historical review of Site conditions and of the alleged existence of jurisdictional wetlands is incomplete and speculative.

Another key fundamental flaw in EPA's analysis is the assumption that the Site was the former home of pristine wetland. The evidence shows that this assumption is not true. A review of the aerial photos is instructive. Willers Lake is not now, nor was it in 1990, a pristine habitat unimpacted by human activity. The lake is owned by the Elk's Lodge, and is also known as the Elk's Lodge Lake. The Elk's Lodge maintains a beach and maintained lawn area on the northeast bank of the lake, and these are clearly identified on the 1990 aerial photo. The eastern shore of the lake is separated from a major four-lane highway (Truman Blvd, Routes 61 and 67) by a narrow strip of land. The aerial photos show that most of that land (now the home of a bustling shopping mall) used to be part of the lake.

It is obvious that the lake and its shores have been impacted by extensive development over the past several decades, unrelated to Rotary Drilling. It is not obvious, however, that any part of that lake ever included any part of the Rotary Drilling property. The railroad, the beach and shoreline roads, and the strip mall development easily could be characterized as having resulted in a "loss of wetland function" and an impact on the wetland and stream habitat and hydrogeology, but all of this activity near the Site pre-dated the use of fly ash at the Site.

With respect to the Rotary Drilling site itself, EPA relies upon some aerial photos that allegedly depict the original outline of Willers Lake. Our recent discussions with Mr. Coleman suggest, however, that Willers Lake never was on the Rotary Drilling property. In fact, the Lake dimensions apparently have changed only as a result of the strip mall, Highway 67 and the Elks Club developments. When Mr. Coleman purchased his property, he recalls that it was a truck farm, and that the entire parcel was used for growing crops. He also identified for us other witnesses who could confirm this fact. When shown the aerial photos depicting much of his property appearing to be under water, Mr. Coleman indicated that there were occasional floods (made much worse after construction of the nearby levee), but that such conditions were temporary, and that the floodwater always would recede, allowing him to resume normal

business activity at the Site. He also stated that there were no wetlands on his property, and no fill material ever was placed in standing water. Thus, there seems to be no factual support for EPA's allegation that fly ash was handled at the Site in violation of the GBUE, and no support for MDNR's recent notice of violation.

If a wetland ever existed on or near the Rotary Drilling property, it was long-gone by the time fly ash first was used for structural fill material in 2005. Thus, this matter does not warrant any Clean Water Act remedies, and certainly none that should be obtained through a RCRA order.

IV. Summary

The foregoing demonstrates that Ameren has no liability in this matter and has sufficient cause to decline participation in EPA's proposed order. Ameren therefore requests EPA to withdraw the proposed order submitted to Ameren, to delete Ameren from the list of potential respondents, and to work with MDNR towards withdrawal of the recent Notice of Violation issued to Ameren. In furtherance of this request, however, Ameren is willing to participate with other Respondents in negotiations concerning a possible Site stabilization project that would leave the structural fill in place, while addressing stormwater impacts and potential slope stability issues. The stabilization of the Site would both mitigate the risk of offsite impacts and provide Mr. Coleman the opportunity to commercially develop his property consistent with existing surrounding land uses. We look forward to working with you and the other Respondents as part of those negotiations.

Sincerely,

Joseph F. Madonia

JFM/bb
Enclosures

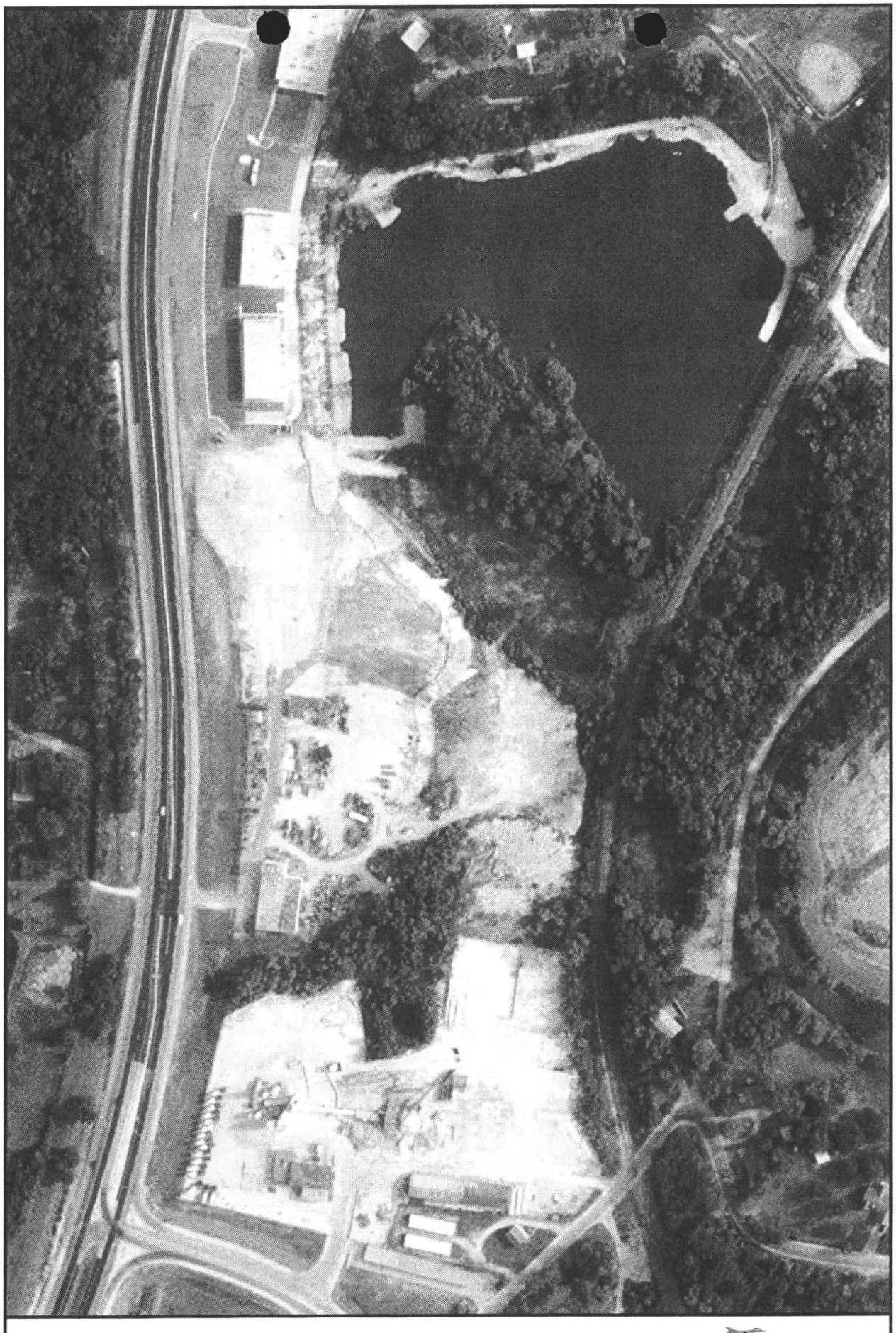

Exhibit A

Festus, MO
7/1/2005

150 0 150 Feet

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AERO - DATA CORP.
Environmental
Remote Sensing Consulting Services
Interpretation and Mapping
225.767.5725

Image Source: USGS

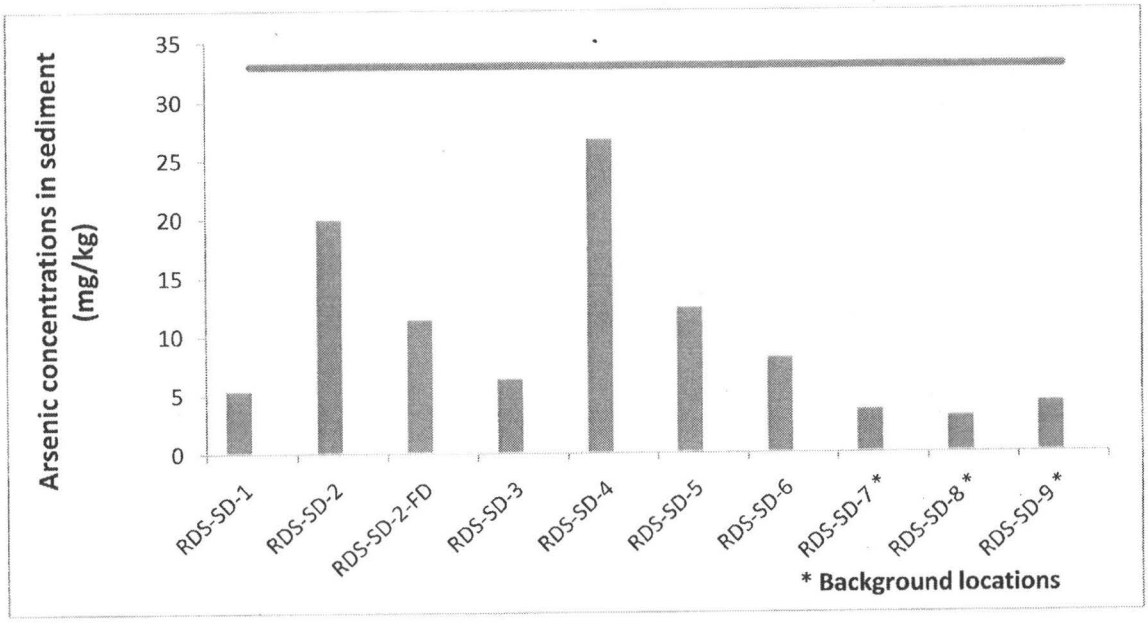

Figure 1. Concentrations of arsenic detected in sediment compared to Probable Effects Concentration (33 mg/kg; MacDonald et al. 2000]

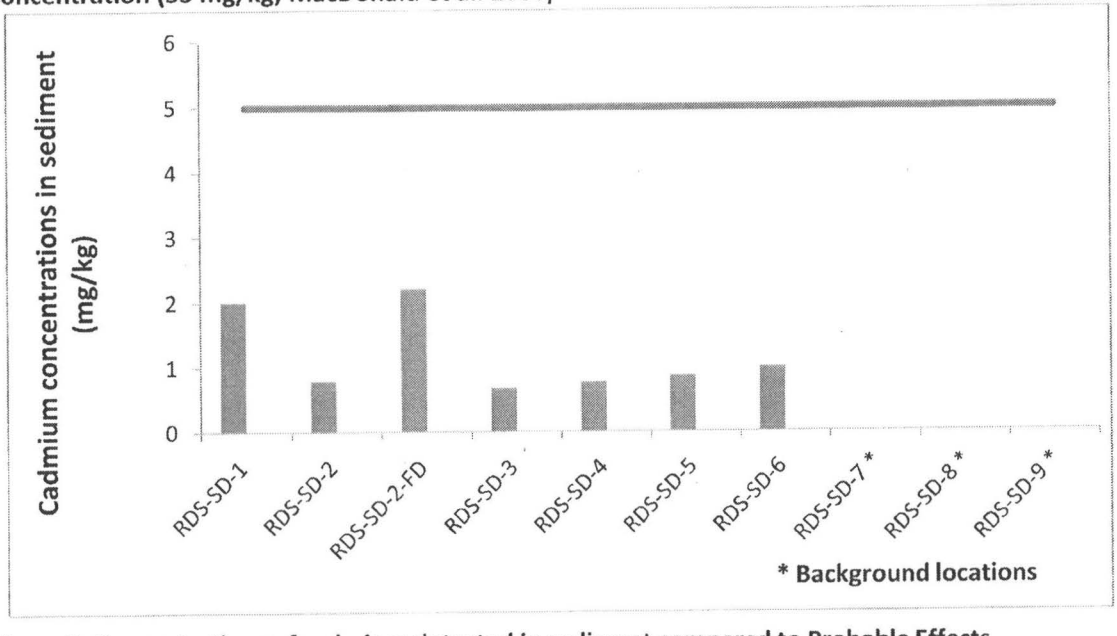

Figure 2. Concentrations of cadmium detected in sediment compared to Probable Effects Concentration (4.98 mg/kg; MacDonald et al. 2000). Cadmium was not detected at background locations.

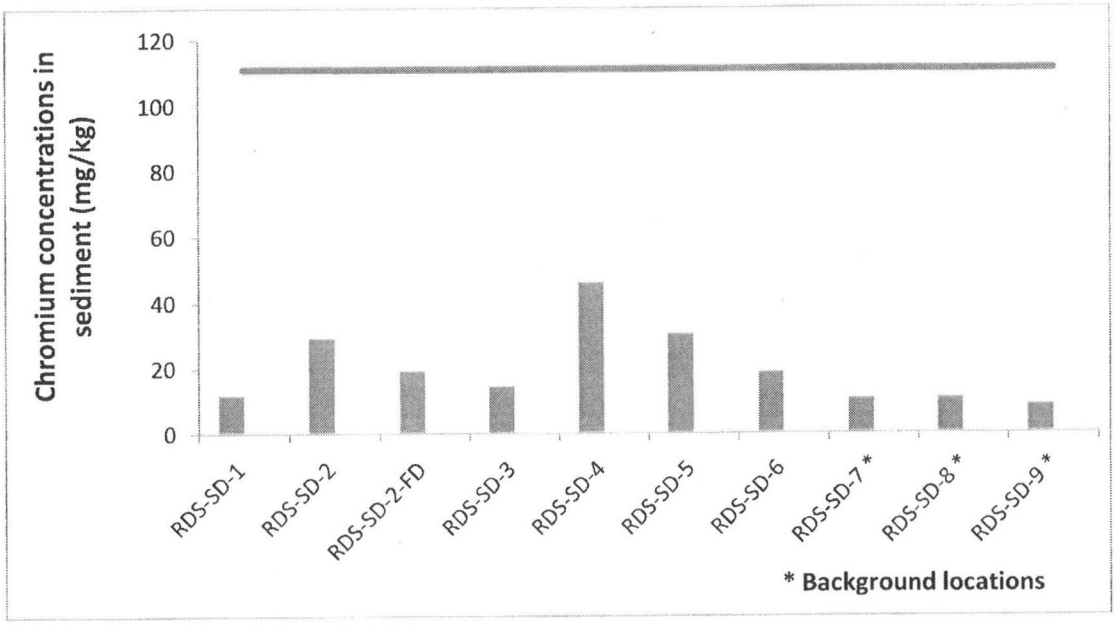

Figure 3. Concentrations of chromium detected in sediment compared to Probable Effects Concentration (111 mg/kg; MacDonald et al. 2000)

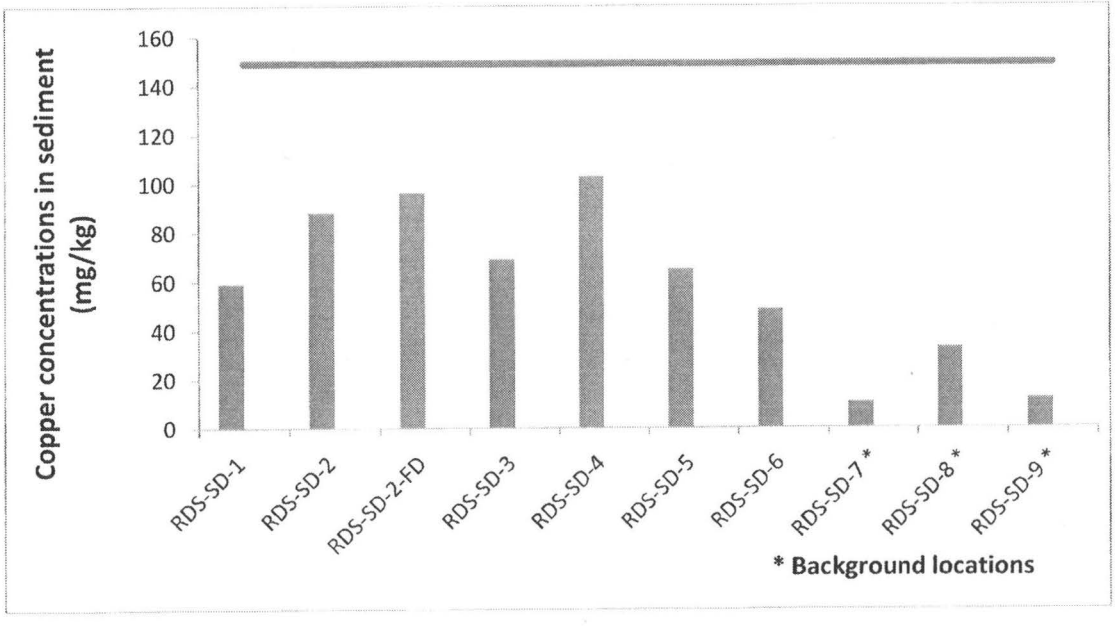

Figure 4. Concentrations of copper detected in sediment compared to Probable Effects Concentration (149 mg/kg; MacDonald et al. 2000)

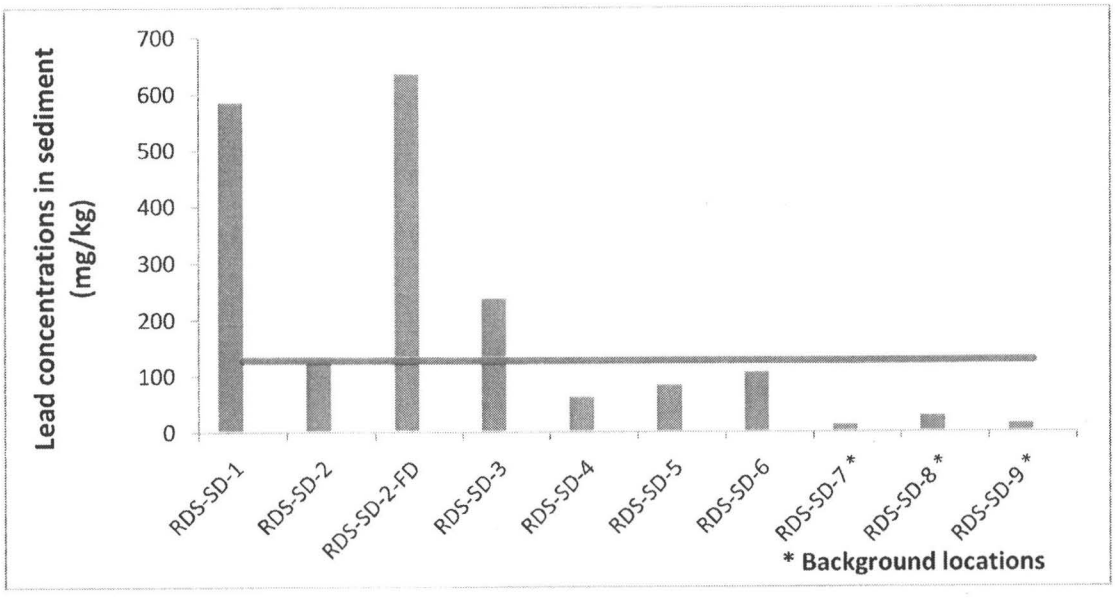

Figure 5. Concentrations of lead detected in sediment compared to Probable Effects Concentration (128 mg/kg; MacDonald et al. 2000)

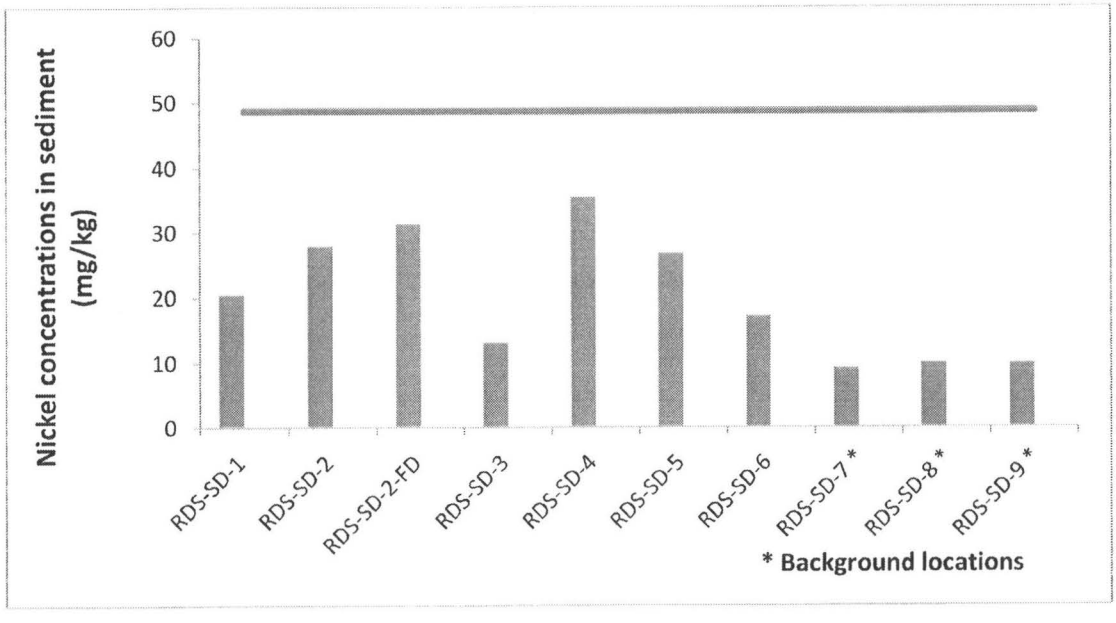

Figure 6. Concentrations of nickel detected in sediment compared to Probable Effects Concentration (48.6 mg/kg; MacDonald et al. 2000)

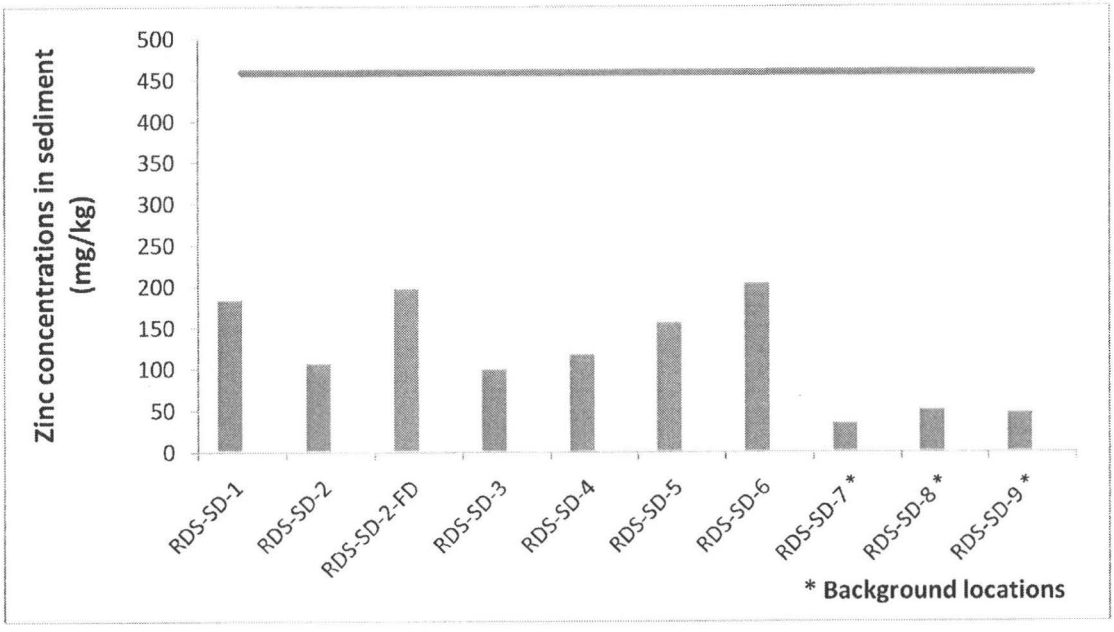

Figure 7. Concentrations of zinc detected in sediment compared to Probable Effects Concentration (459 mg/kg; MacDonald et al. 2000)

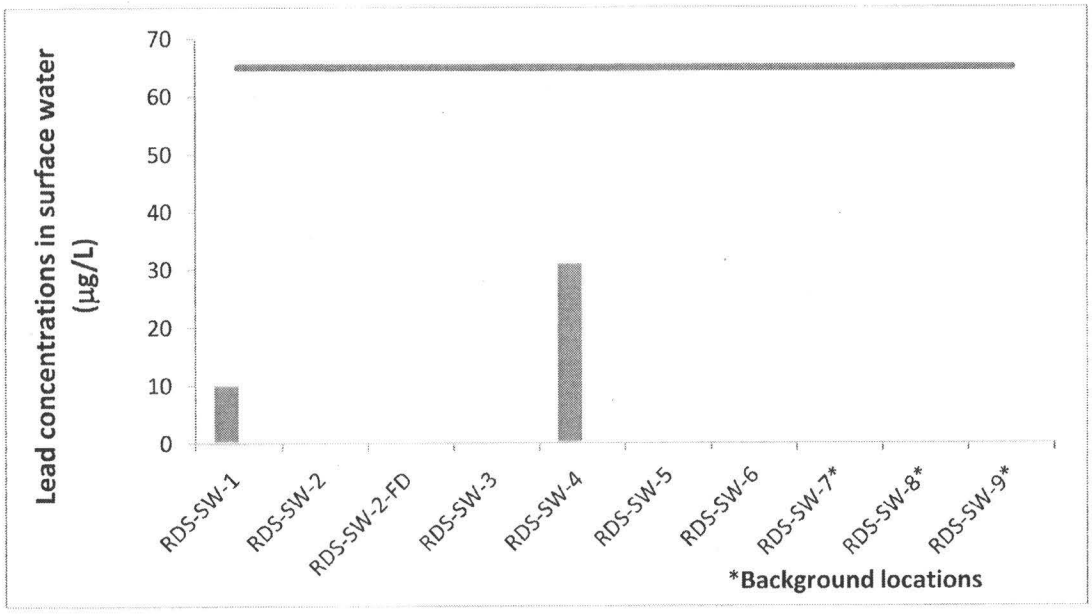

Figure 8. Concentrations of lead detected in surface water compared to acute National Ambient Water Quality Criteria (65µg/L). Lead was detected at two locations.

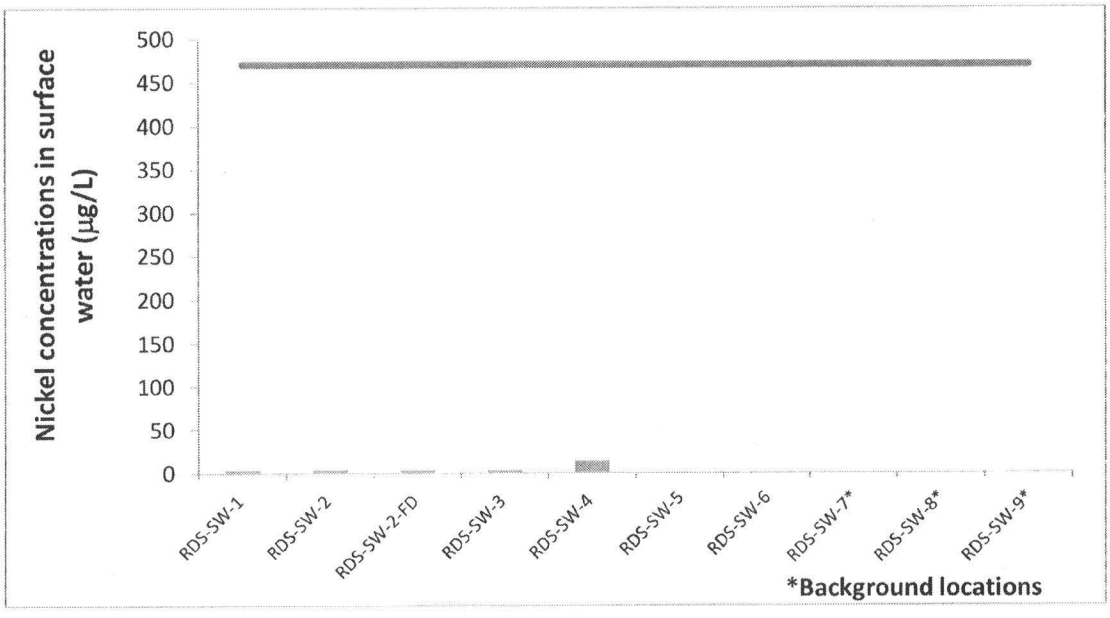

Figure 9. Concentrations of nickel detected in surface water compared to acute National Ambient Water Quality Criteria (470 µg/L). Nickel was detected at five locations.

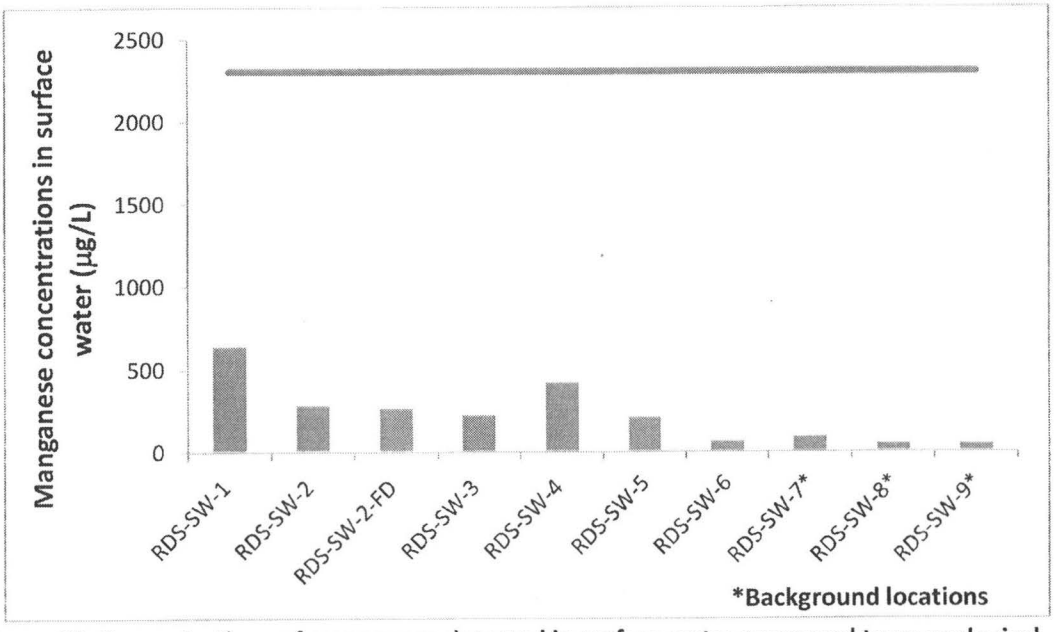

Figure 10. Concentrations of manganese detected in surface water compared to an ecological screening value of 2,300 µg/L, which is a secondary acute value from Suter and Tsao (1996).

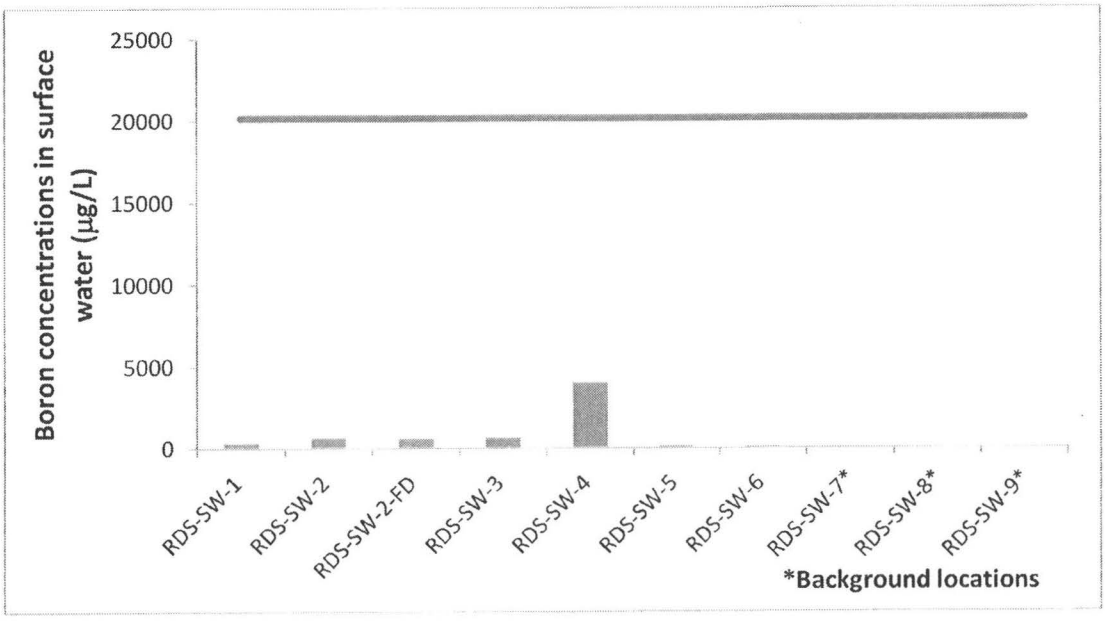

Figure 11. Concentrations of boron detected in surface water compared to an ecological screening value of 20,160 µg/L, which is a secondary acute value from Suter and Tsao (1996). Boron was not detected at background locations.

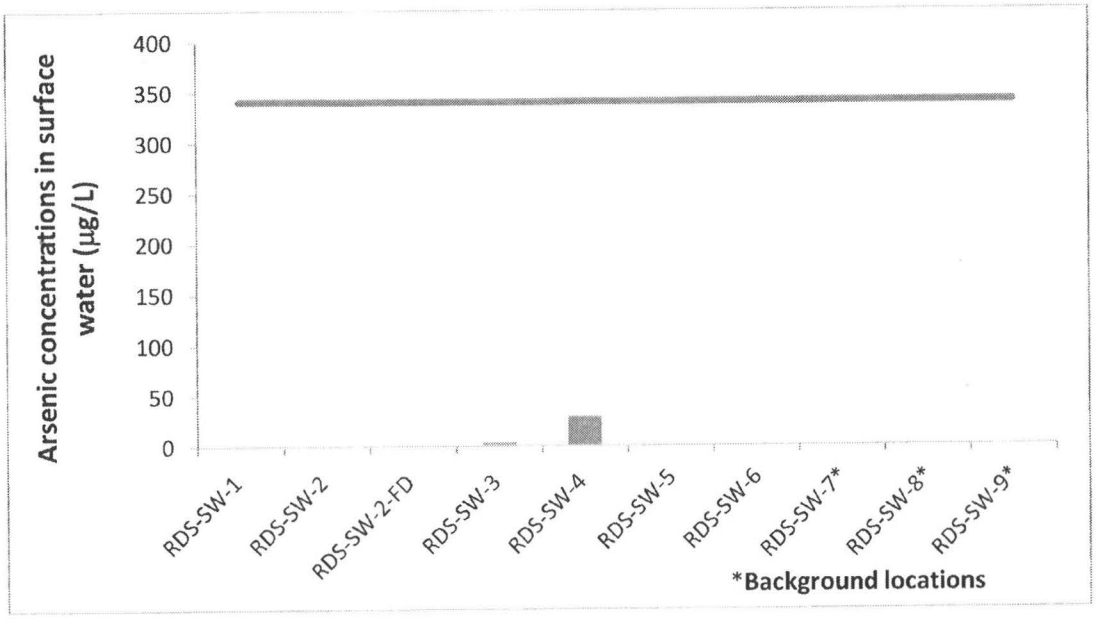

Figure 12. Concentrations of arsenic detected in surface water compared to acute National Ambient Water Quality Criteria (340 µg/L). Arsenic was detected at two locations.

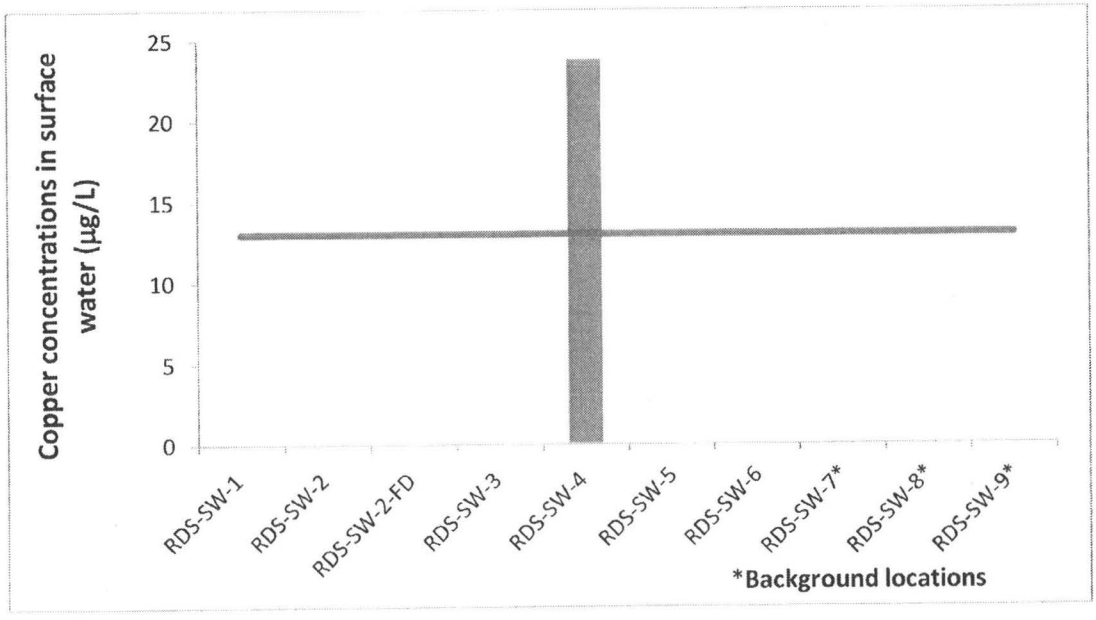

Figure 13. Concentrations of copper detected in surface water compared to acute National Ambient Water Quality Criteria (13 µg/L). Copper was detected at one location.

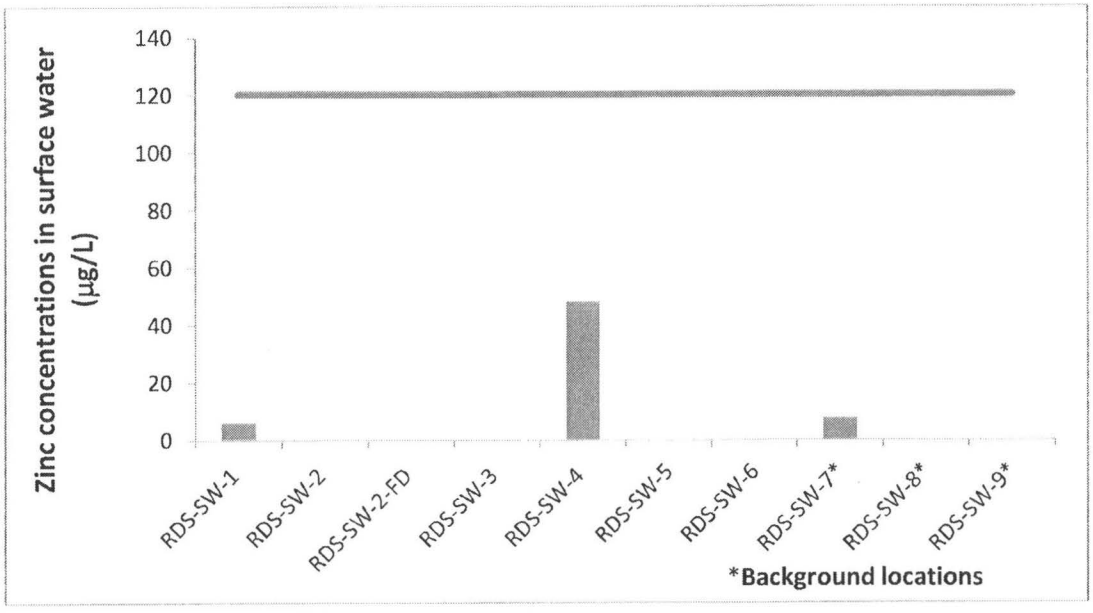

Figure 14. Concentrations of zinc detected in surface water compared to acute National Ambient Water Quality Criteria (120 µg/L). Zinc was detected at three locations.